



VIRGINIA COAL SURFACE MINING AND RECLAMATION PERMANENT REGULATORY PROGRAM

ADMINISTRATIVE HEARINGS MANUAL

TABLE OF CONTENTS

SECTION 1: GENERAL	2
SECTION 2: TYPES OF HEARINGS	2
Informal Conferences and Hearings	2
Informal Conferences - Permitting and Bonding Applications	2
Informal Hearings - General	3
Formal Public Hearings	4
Hearing Officers	5
Temporary Relief Hearing	5
Formal Hearing Procedure	6
Review and Reconsideration	7
Judicial Review	7
SECTION 3: HEARING PROCESSES	8
Informal Conference (Section 45.1-239)	8
Formal Hearing - Applications (Section 45.1-240)	8
Civil Penalties (Section 45.1-246)	8
Performance Bond - Forfeiture/Release (Section 45.1-247)	8
Issuance of NOV/CO/Orders (Section 45.1-249)	9
Designating Areas Unsuitable for Mining (Section 45.1-252C)	9

SECTION 1: **GENERAL**

This reference is intended to inform Division personnel of the various administrative review processes and to identify agency responsibilities. If you have any questions concerning the administrative review process, please contact the Hearings Coordinator.

SECTION 2: **TYPES OF HEARINGS**

Informal Conferences and Hearings

The Reclamation Program Manager coordinates the informal conferences for permit and bond release applications (informal conference held prior to the final application decision).

The Hearings Coordinator coordinates informal hearings to review agency decisions (i.e., issuance of enforcement action, civil penalties, complaint investigation reviews, and application approvals or denials).

Informal Conference Procedure - (Permitting & Bond Reduction/Release Applications)

Written requests for informal conference will be routed to the Reclamation Program Manager or the Review Inspector. The request –

- Must be timely within 30 days from last date of publication of the public notice.
- Should specify if the citizen wants the conference in the general area of the operation. If not, the Division will schedule the conference at a location that is near the proposed/permit operation. The Big Stone Gap and Keen Mountain offices will be utilized unless a better location is available.

Scheduling informal conference –

- The Review Inspector will schedule the conference to be held at the DMME's Big Stone Gap or Keen Mountain office (whichever is closest to the proposed operation), or if requested in writing by the conference requestor at a location near the proposed/permit operation that is accessible to the public.
- The conference will be scheduled for normal business hours; unless, the unique circumstances of the application necessitate scheduling after normal work hours.
- The conference will be scheduled to allow for at least two weeks public advertisement notice (published in newspaper of general circulation) of the conference date, time, and location.
- The Review Inspector will send notice of the conference by certified mail (return receipt requested) to the person(s) who requested the conference.

Informal conference –

- The Hearings Coordinator will preside as the facilitator of the informal conference. The conference will be recorded.

- A copy of the application will be made available at least one hour before the conference to give interested parties an opportunity to review the application materials.
- A sign-in sheet will be provided to identify the persons who wish to present oral comments.
- DMLR attendees will normally include the conference facilitator, area inspector and supervisor, and a Reclamation Services or Program Manager.
- Upon opening the conference, the facilitator will inform those attending of the purpose of the conference, and clarify that it is not an adversarial proceeding nor forum for public debate.
- Depending on the number of participants, the facilitator may allow each participant to offer oral comment in the conference room or direct the person to a separate room where comments will be taken. This will ensure that each person's comments are recorded in an orderly fashion.
- The facilitator will close the conference once each person has been given the opportunity to voice his/her comments. No further discussions concerning the application will be allowed once the conference is closed.
- The facilitator, if needed, may grant the attendees an additional 10 calendar days to submit written comments.

Post conference -

- The facilitator will ensure that a copy of the conference transcript is prepared and provided to the appropriate DMLR personnel and will summarize the questions or concerns raised.
- Upon receipt of the DMLR conference response comments, the facilitator will prepare the DMLR summary findings and send them with a copy of the conference transcript to each person who offered comments at the conference. This information shall also be sent to the applicant.

Informal Hearings - General

Upon receipt of a written request for an informal hearing to contest a Division decision, the Hearings Coordinator will determine whether the request was submitted within the applicable regulatory time limit. If the request is untimely, a letter will be sent by certified mail to the person who requested review. The letter shall explain the reason for denying the hearing request.

The Hearings Coordinator shall assign the informal hearings officer and notify the parties of the date, time, and location of the informal hearing. The hearing will be –

- held at the mine site, at a location near the mine site, or at a location acceptable to the parties.
- open to the public, and any person attending may provide comments relevant to the

contested matter.

The Informal Hearing Officer will allow cross-examination among the parties, relative to the action or decision being contested. Upon conclusion of the hearing, the Informal Hearings Officer shall inform the parties that a recommendation will be rendered within the applicable regulatory time frame. The Informal Hearings Officer's recommendation will be submitted for approval to:

- Reclamation Services Manager - for permitting, enforcement, and bonding issues.
- Assessments Officer - for appeals of civil penalties.

The Informal Hearing Officer's decision will contain a summary of the discussions submitted at the hearing, and a recommendation to affirm, modify, or vacate the action under review. In a situation where enforcement action was taken due to the findings of a DMLR complaint/technical report, the Informal Hearing Officer should identify in the hearing recommendation any area(s) of the technical report finding that should be re-visited, re-evaluated, and modified (if necessary). The Reclamation Services Manager's written decision to affirm the Informal Hearing Officer's recommendation will set a time frame for the technical re-evaluation and preparation of an addendum to the original technical conclusions. (The company and affected complainant(s) will be copied with the addendum.)

The hearing decision must be sent by certified mail (return receipt requested) to the person who requested the review. A copy must be provided to any person who may have filed a concern or complaint with the Division that resulted in the contested agency action. The decision will also include the procedure for requesting a formal hearing.

The Hearings Coordinator will maintain the administrative hearing file.

Formal Public Hearings

There are several types of administrative formal hearings available to the permittee or person wishing to contest an action of the Division. However, the basic hearing process is generally the same for each type of hearing (Sections 45.1-250 and 2.2-4020 of the **Code of Virginia**).

The Hearings Coordinator will determine if the written request for a formal hearing was timely and proper. If the request was submitted after the regulatory time frame, the Hearings Coordinator will notify the hearing applicant in writing that the right to the hearing had expired.

For timely requests, the Hearings Coordinator will gather preliminary information relevant to the hearing request for forwarding to the Hearings Officer and Assistant Attorney General. Information and support documentation will be solicited from the appropriate sections of the Division. Due to the time constraints imposed by regulation and law, a hearing will be scheduled expeditiously, contingent upon the Hearings Officer's and Assistant Attorney General's availability.

Hearing Officers

In 1986, legislation established a Hearing Officer system, administered by the Executive Secretary of the Virginia Supreme Court. The Hearings Coordinator serves as the agency contact with the Executive Secretary's office to obtain the services of a qualified hearing officer.

In cooperation with the Executive Secretary's office, the Department has provided specialized training in the laws and regulations administered by the agency to various hearing officers. After completing the training, the hearing officers are qualified to preside over formal administrative hearings for the Department.

The assignment of a hearing officer is by rotation of those qualified to serve. The person at the top of the rotation will be contacted first and asked to serve. If the prospective hearing officer has a schedule conflict, the Hearings Coordinator will proceed to contact the other hearing officers in sequence until an acceptable hearing date can be set. The Executive Secretary's Office will be advised of the hearing officer selection.

The Hearings Coordinator will inform (by letter) the hearing applicant, permittee, Assistant Attorney General, hearing officer, other parties, and appropriate Division personnel of the hearing date, time, and location. The hearing will be conducted at the Department's Big Stone Gap or Keen Mountain office. If an objection to the location is made, the hearing may be conducted at a public facility located in the county where the operation is (or will be) situated.

The Hearings Coordinator will issue subpoenas for witnesses, written or printed materials as requested by the hearing participants. The Reclamation Services Manager will assist in the service of the subpoenas.

Section managers will ensure the participation of appropriate Division personnel as requested by the Assistant Attorney General or Hearings Coordinator.

Temporary Relief Hearing

A company (or person with a valid legal interest) may request a hearing for temporary relief from the Division's action, pending the outcome of the formal hearing decision. The Hearings Coordinator will schedule the temporary relief proceeding as soon as possible. In the event that a company's mining operations were caused to cease, due to Division enforcement action, the relief hearing must be held within 5 working days of receipt of the request (45.1-249(C) of the **Code of Virginia**).

The temporary relief hearing may be conducted on a separate date or just prior to the actual formal hearing. The temporary relief proceeding must be open to the public. The moving party (applicant) must prove to the Hearings Officer that –

- There is a substantial likelihood that the decision of the Director will be favorable to

him.

- Temporary relief will not adversely affect the health or safety of the public or cause significant imminent environmental harm to land, air, or water resources.

The temporary relief proceeding will be conducted in accordance with Section 2.2-4020 of the **Virginia Administrative Process Act**. The Hearings Officer will receive evidence, testimony, and legal argument from the parties, then render a recommendation to grant or deny the temporary relief request. The Deputy Director will render the final decision to grant or deny the relief. The Hearings Coordinator will ensure a copy of the decision is provided to the parties of the hearing.

Formal Hearing Procedure

The Assistant Attorney General will determine the best manner to present the Division's case. The Hearings Coordinator will provide assistance, as requested.

The Hearing Officer will conduct the formal hearing in accordance with the applicable provisions of the **Virginia Administrative Process Act** and the **Virginia Coal Surface Mining and Reclamation Regulations**.

The Division has the burden to establish a *prima facie* case before the hearing officer. The hearing applicant shall have the ultimate burden of proof.

After the presentation of evidence and argument, the Hearing Officer may permit the parties to submit written briefs. The Hearings Coordinator will monitor the briefing schedule to ensure compliance by the parties and an expeditious decision.

The Hearing Officer's recommended decision (findings of fact, conclusions of law, and recommended findings) will be received by the Hearings Coordinator, who will forward a copy to the appropriate Division personnel for comment. Once comments are received, the Hearings Coordinator will prepare a draft decision for the Deputy Director's signature. The draft decision will be routed through the Division's Customer Services Manager and Director for approval. Once approved, the decision and hearing record will be forwarded to the Deputy Director. The decision and hearing officer's opinion will be sent by certified mail to the parties.

The Hearings Coordinator will ensure that the administrative hearing record is compiled and maintained. In the event of further administrative or judicial review, the Hearings Coordinator will ensure that the record contains only the material considered by the Hearings Officer. An appeal of a final formal hearing decision will be subject to review and reconsideration by the Deputy Director. No further evidence would be admissible during review or reconsideration. (Appeals beyond the formal hearing shall be based solely upon the administrative hearing record.)

Review and Reconsideration

A party to the formal hearing may request review and reconsideration by the Deputy Director. The written request will be routed to the Hearings Coordinator, who will:

- determine if it was proper and timely submitted.
- notify the party as to whether review and reconsideration will be granted. And if not granted, specify reason(s) the request was denied.
- notify the parties of the schedule to submit or present written and oral argument to the Deputy Director, and that the submission of additional evidence will not be allowed.
- provide the Deputy Director with the formal hearing administrative record, including exhibits and closing briefs considered by the Hearing Officer.

After the parties are given the opportunity to present oral or written argument, the Deputy Director will complete review of the hearing record and formal hearing decision. Upon completion of the review and reconsideration, the Deputy Director will prepare a written decision. The decision will also inform the appellant of the right to appeal to the Circuit Court, pursuant to the Rules of the Supreme Court of Virginia. The Hearings Coordinator will ensure all parties are provided a copy of the decision.

Judicial Review

A party to the administrative hearing may appeal the review and reconsideration decision to the appropriate County or City Circuit Court, pursuant to the Rules of the Virginia Supreme Court.

The party seeking appeal must file a Notice of Appeal with the agency within 30 days of receiving the review and reconsideration decision. This must be followed with service of a “Petition of Appeal” that has been filed with the appropriate Circuit Court Clerk’s office, as required by the Rules of the Virginia Supreme Court.

In the event the final administrative decision is appealed to the Circuit Court (Section 45.1-251 of the Act), the Hearings Coordinator will ensure the formal hearing transcript and complete administrative record is forwarded to the appropriate Circuit Court Clerk’s office. The record will be sent to the Circuit Court Clerk’s office after the Division has been served with the “Petition of Appeal”.

Prior to forwarding the record to the Circuit Court Clerk, the Hearings Coordinator will inform the parties by letter of the administrative record content. The parties will be given an opportunity to inform the Hearings Coordinator as to whether they see any omission or deficiency in the record compilation.

If no objections to the record are received, the record will be sent by certified mail or hand delivered to the appropriate Circuit Court Clerk. A cover letter summarizing the contents of the record will be included. A copy of the cover letter will be sent to counsel for each party to the appeal and appropriate Division personnel.

The Assistant Attorney General will notify the Hearings Coordinator when and if additional information should be sent to the Court.

SECTION 3: **HEARING PROCESSES:**

Informal Conference (Section 45.1-239)

Applicable Regulations:

- | | |
|---------------------------|---|
| A. 4 VAC 25-130-773.13(c) | Informal Conference |
| B. 4 VAC 25-130-773.15(a) | Review of Permit Application |
| C. 4 VAC 25-130-774.13 | Permit Revisions |
| D. 4 VAC 25-130-774.15 | Permit Renewals |
| E. 4 VAC 25-130-800.40(f) | Requirements to Release Performance Bonds |

Formal Hearing - Applications (Section 45.1-240)

Applicable Regulations:

- | | |
|---------------------------|---|
| A. 4 VAC 25-130-772.12(e) | Permit Requirements for Exploration Removing More Than 250 Tons of Coal |
| B. 4 VAC 25-130-773.15 | Review of Permit Applications |
| C. 4 VAC 25-130-773.21(c) | Improvidently Issued Permits: Rescission Procedures |
| D. 4 VAC 25-130-774.11(c) | Division Review of Permits |
| E. 4 VAC 25-130-774.15(f) | Permit Renewals |
| F. Part 4 VAC 25-130-775 | Administrative Review |
| G. Part 4 VAC 25-130-789 | Procedures Applicable to Administrative Hearing |

Civil Penalties (Section 45.1-246)

Applicable Regulations:

- | | |
|------------------------|--------------------------------------|
| A. 4 VAC 25-130-845.18 | Procedures for Assessment Conference |
| B. 4 VAC 25-130-845.19 | Request for Hearing |

Performance Bond - Forfeiture/Release (Section 45.1-247)

Applicable Regulations:

- | | |
|------------------------|--|
| A. 4 VAC 25-130-800.40 | Requirements to Release Performance Bonds |
| B. 4 VAC 25-130-800.51 | Administrative Review of Performance Bond Forfeiture |
| C. 4 VAC 25-130-801.17 | Bond Release Application |

Issuance of NOV/CO/Orders (Section 45.1-249)

Applicable Regulations:

- | | |
|------------------------|--|
| A. 4 VAC 25-130-842.15 | Review of Decision not to Inspect or Enforce |
| B. 4 VAC 25-130-843.13 | Suspension or Revocation of Permits |
| C. 4 VAC 25-130-843.15 | Informal Public Hearing |
| D. 4 VAC 25-130-843.16 | Formal Review of Citations |

Designating Areas Unsuitable for Mining (Section 45.1-252C)

Applicable Regulations:

- A. 4 VAC 25-130-761.12 Procedures
- B. 4 VAC 25-130-764.15 Initial Processing, Record keeping, and Notification Requirements
- C. 4 VAC 25-130-764.17 Hearing Requirements
- D. 4 VAC 25-130-764.19 Decision